



FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Reportable:	NO
Of Interest to other Judges:	NO
Circulate to Magistrates:	NO

Case No. : 5719/2019

In the matter between:-

EM VENTER

1st Applicant

LECHWE LODGE GAME FARM (PTY) LTD

2nd Applicant

SJ WESSELS

3rd Applicant

And

TV MATSEPE N.O.

1st Respondent

OA NOORDMAN N.O.

2nd Respondent

MATSEPES INC.

3rd Respondent

THE MASTER OF THE HIGH COURT

4th Respondent

SEBASTIAAN JACOBUS WESSELS

5th Respondent

CORAM:

MOLITSOANE, J

HEARD ON:

15 AUGUST 2019

JUDGMENT BY: MOLITSOANE, J

DELIVERED: 29 AUGUST 2019

- [1] The Applicants seek an order for costs against the First and Second Respondents in their personal capacities. No relief is sought against the remainder of the respondents. For convenience the First and Second Respondents will jointly be referred to as 'the respondents'.
- [2] The respondents are practising attorneys at Matsepes Incorporated, a firm of attorneys practising as such and were appointed liquidators of Sebal Beleggings (Pty) Ltd Registration number 2006/012369/07 (herein after referred to as Sebal) –Master's Ref B98/12.
- [3] On the 24th June 2014 the respondents were interdicted by this Court to proceed with the liquidation of Sebal pending the finalisation of a review application to the Master to remove them as liquidators, alternatively by an application to Court for their removal by the Applicants in terms of section 379(2) of the Companies Act 61 of 1963. The application for an interdict (herein after referred to as 'the application') became moot

after this Court set aside the liquidation of Sebal on the 28th April 2016.

- [4] In June 2016 the Master again re-appointed the respondents as liquidators together with an independent liquidator, one Phillip Fourie.
- [5] This Court dismissed a review application brought by the Respondents to remove them as liquidators on the 20th May 2019 and the court granted an order of costs against the respondents in their personal capacities, jointly and severally.
- [6] On the 6th June 2019 under case number 4528/2018 this court declared that Sebal was not in liquidation.
- [7] The issue for determination is whether the respondents should be ordered to pay costs of the initial relief sought in the interdict seeing that the respondents were finally removed as liquidators including the costs reserved on previous occasions.
- [8] It is submitted that the Applicants were successful in the relief sought under case number 2688/2014 and that the respondents were ultimately removed as liquidators and as a result the Applicants are entitled to the relief sought in this application.
- [9] It is trite that the award of costs lies in the discretion of the court. The purpose of an award for costs to a successful party is to indemnify him or her for the expense to which he or she

was put through, having been unjustly compelled to initiate or defend litigation¹.

[10] The basic rules for awarding costs were set out as follows in **Ferreira v Levin NO and Others**²:

“The Supreme Court has, over the years, developed a flexible approach to costs which proceeds from two basic principles, the first being that the award of costs, unless expressly otherwise enacted, is in the discretion of the presiding judicial officer, and the second that the successful party should, as a general rule, have his or her costs. Even this second principle is subject to the first. The second principle is subject to a large number of exceptions where the successful party is deprived of his or her costs. Without attempting either comprehensiveness or complete analytical accuracy, depriving successful parties of their costs can depend on circumstances such as, for example, the conduct of the parties, the conduct of their legal representatives, whether a party achieves technical success only, the nature of litigants and the nature of the proceedings.”

[11] As a starting point, I need to emphasise that this Court is not called upon to decide whether the successful litigant ought to be awarded the costs of the litigation. Mine is to determine whether the respondents should be ordered to pay the costs in their personal capacities. It is common cause that the respondents were duly appointed by the Master as liquidators in the then Sebal (in liquidation). It is further common cause that at the time when an application was launched in case

¹ See *Texas Co (SA) Ltd v Cape Town Municipality* 1926 AD 467 at 488

² 1996(2) SA 621 (CC) 624 B-C par [3]

number 2688/2014 the respondents acted in *nomine officio* in opposing it. It is the contention of the respondents that in opposing the granting of the relief sought in the said application they were executing their duties as liquidators. This contention in my view remains uncontested. It is in my view axiomatic that in executing their mandate as liquidators, they were entitled to oppose the application if in their view that would serve to protect the interests of the creditors or to advance them. The fact that the application became moot does not detract from the fact that the respondents were entitled to oppose the application if in their considered view the interests of the creditors demanded it.

[12] It is not the case for the Applicants that the respondents acted unreasonably or *mala fide* in opposing the application. It is also not the case for the Applicants that the opposition of the application by the respondents was misconceived or for that matter ill conceived. No untoward conduct was levelled or suggested against the respondents in opposing the application. No argument was advanced to the effect that the respondents acted *ultra vires* in opposing the application. The Applicants in a nutshell do not seek any punitive cost order or an order *de boniis propriis* against the respondents.

[13] The basis for the submissions of the Applicants that the respondents should be mulcted with costs in their personal capacities is simply that the Court ultimately declared that Sebal was not in liquidation and it would, therefore, be unfair to burden it with costs. This argument, in my view fails to

appreciate that at the time of the application, the respondents were acting in their official capacities and were acting within their course and scope of their mandate. I can find no reason why the respondents should be saddled with costs in their personal capacities, in the absence of any recklessness, or acting to the detriment of the creditors or exceeding their mandate, when they executed the mandate they were appointed to execute. On this point alone, this application ought to be dismissed.

- [14] Even if it could be said that I am wrong in my finding, the challenge faced by the Applicants is that the respondents in their personal capacities are not before me. They have not been joined as respondents in this application for a cost order against them. Counsel for the Applicants referred this Court to the order made in case number 5081/2017 in which this Court ordered, inter alia, that the respondents should pay the costs of the review application in their personal capacities. In that case the respondents were joined as parties and they appeared before Court in both their official and personal capacities. This is not the case in the matter before me. They are simply not before me in their personal capacities. I decline to make an order against the parties who are not litigants before me. On this point also, this application stands to be dismissed. I can find no reason why the costs should not follow the successful party. I make the following order:

ORDERS

1. The application is dismissed with costs.

P.E. MOLITSOANE, J

On behalf of the Applicants: Adv FG Janse Van Rensburg

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On behalf of the 1st and 2nd : Adv CJ Hendriks
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